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No. 89-1371

In The

Supreme Court of the United States

October Term, 1989

David R. Webb Company, Incorporated,
Petitioner,

v.

National Labor Relations Board,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

1a. The Brief for the National Labor Relations Board in Opposition ("Br. Opp."), attempts to narrow the decision below by insinuating that Webb forced the three employees (Hill, Young, and McGaha) into positions in which they were predestined to fail because they were, somehow, physically unable to perform the work which they voluntarily accepted. (Br. Opp. 1-2, 6). The Court of Appeals, however, never questioned the ability of the reinstated employees to perform this work.

Indeed, neither the opinion below nor the underlying Board decision even alludes to the possibility that the three employees were physically incapable of performing the dryer-feeder work or that it was so onerous that the employee's poor performance could be excused. Both the opinion below and the Board's underlying decision recognized that the three employees were properly reinstated to the dryer-feeder position, and that Webb lawfully terminated them for performance deficiencies. (Pet. 8 n.2). Moreover, the Board refused to adopt the ALJ's finding regarding McGaha's alleged disability because that finding was not "fully supported by the record." (Pet. App. 23a-24a n.2; compare Br. Opp. 3 n.3).

1b. Premised in part on the above mischaracterization of the decision below, the Board argues that:

> The threat inherent in petitioner's position -- that a striking employee may be relegated to any position for which he or she is believed to be qualified, no matter how menial, low-paying, or poorly suited to the employee's capabilities -- would undoubtedly be a powerful deterrent to the exercise of the right to strike. (Br. Opp. 9-10).

There is both error and irony in this statement.

The error stems from the Board's gross mischaracterization of Webb's position. Webb does not seek to "relegate" reinstated strikers to less desirable positions. Rather, Webb merely requests that this Court review the unprecedented holding below that an employer can never satisfy the reinstatement obligation established in *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967), short of reinstating the striker to his pre-strike or a substantially equivalent position. Where, as here, an employee *accepts* an offer of reinstatement in a position for which he is qualified -- an offer *Fleetwood* compels the

employer to make -- and is later discharged for cause, the employer is not required to make future offers of reinstatement.

The irony in the Board's characterization of Webb's position is that in *Arlington Hotel Company, Inc.*, 273 NLRB 210 (1984), *enf'd., Arlington Hotel Company, Inc. v. NLRB*, 785 F.2d 249 (8th Cir.), *cert. denied*, 479 U.S. 914 (1986), the Board *itself* imposed the legal standard which the Board now condemns as threatening. In *Arlington Hotel*, the Board, relying on *Fleetwood*, concluded that an economic striker must be offered reinstatement to any available position for which he is qualified even if it is less skilled and lower paid. The Board adopted the following analysis set forth in the ALJ's opinion:

> . . . I reject [the employer's] argument that an economic striker is only entitled to full reinstatement to his pre-strike job. Further I reject [the employer's] reliance on the failure of any striker to express an interest in a job other than his or her pre-strike job. [The employer] has the *obligation* to offer reinstatement to returning strikers and must do so without discrimination against the returning strikers. *A lesser job with less pay and/or reduced benefits may not be as attractive but is better than no job at all.*
>
> * * *
>
> I specifically find that [the employer's] refusal to consider striking employees, who made application to return, for positions other than their pre-strike positions discriminated against the strikers by such refusal and by showing partiality for newly hired employees. [The employer's] obligation is to offer vacancies to returning strikers.

273 NLRB at 215-217 (emphasis supplied). The Eighth Circuit Court of Appeals enforced the Board's decision, concluding

"that the [employer] discriminated against the strikers by not offering them jobs for which they were qualified." 785 F.2d at 251.

Thus, the Board's statement in this case that "an employer *may* offer former strikers positions for which they are qualified, even if those positions are not substantially equivalent to those the employees have previously held" (Br. Opp. n.5; emphasis supplied), obscures Webb's legal *obligation* to offer to reinstate the three employees to the dryer-feeder position -- "no matter how menial, low-paying, or poorly suited to the employee's capabilities . . . ." By following the Board's own mandate to offer the three employees the dryer-feeder position, Webb presented no "threat" to employee rights. In seeking review of the decision below, Webb merely seeks to balance an employee's absolute right to reinstatement against Webb's statutory rights to expect competent performance and discharge employees for just cause.[1]

[1]The Board implies that Webb was "seeking to *limit* employees to positions inferior to those" they held prior to the strike. (Br. Opp. 14). This is not Webb's position. The only "limit" advanced is that a discharge for cause from a position for which the employee was qualified, and which he voluntarily accepted, extinguishes any rights initially preserved to the employee by *Fleetwood*.

Similarly, the Board's Brief, following the Court of Appeals' reasoning, erroneously implies that adopting Webb's position in this matter "could allow a system which *forces* the striker to accept a position at which he is predestined to fail." (Br. Opp. 6; emphasis supplied). It is undisputed that the three employees at issue in this case voluntarily accepted the reinstatement Webb was legally required to offer; they were *not* "forced" to accept the dryer-feeder operator position.

1c. The Board is unable to cite a single decision which actually supports the extreme position taken by the Seventh Circuit.[2] The

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[2]The cases cited in the Board's Brief which purportedly support this unprecedented position are inapposite. (Br. Opp. 9). There is nothing in *H & F Binch Company*, 188 NLRB 720 (1971), which suggests the employer offered reinstated strikers "interim" employment, as if it was going to return the former strikers to their former positions at some point in the future. The employer offered those strikers "jobs as *new employees* at the *minimum wage rate* and *without credit for past seniority*. . . ." *Id.* at 725 (emphasis supplied). Under the egregious facts in *Binch*, the Board never had to go beyond the fact that the employer did not *begin* to comply with *Fleetwood*.

Far from supporting the Board's position, *Arlington Hotel*, discussed earlier, principally stands for the proposition that an employer is obliged by law to extend to former strikers an offer of *any* position for which the striker is *qualified*. It says nothing and implies nothing about the reinstatement rights of an employee who accepts that position and is later discharged for just cause. The same is true of *Rockwood & Company*, 281 NLRB 862 (1986), *enf'd*, 834 F.2d 837 (9th Cir. 1987). In *Rockwood*, the Board and Court of Appeals noted that an employee who *refuses* the offer of work for which he is qualified does not lose the rights established by *Fleetwood*. 834 F.2d at 841-842. There, moreover, the employer threatened the employee that, if he turned the offer down, he would be discharged. 281 NLRB at 877.

Coca-Cola Bottling Company, 269 NLRB 1101 (1984) and *Custom Craft Manufacturing Company*, 212 NLRB 255 (1974) are completely irrelevant. Both involved unfair labor practice strikes, not economic strikes. Since the rights of unfair labor practice strikers are different from those of economic strikers -- entitling the former to immediate reinstatement to substantially equivalent positions upon an unconditional offer to return to work, *see Custom Craft*, 212 NLRB at 258 -- *Fleetwood* is not even discussed in either case.

Footnote continued on next page

Board therefore attempts to minimize the sweep of the decision below by arguing that:

> When there is no showing that the employee's poor performance in an interim job has any bearing on his suitability to perform his pre-strike (or substantially equivalent) position, a refusal to offer the employee reinstatement in that position interferes with the exercise of the right to strike. (Br. Opp. 11).

This is not the legal standard established by the decision below. The Court of Appeals held, quite clearly, that *Fleetwood* requires reinstatement to the striker's pre-strike or a substantially equivalent position, and that a discharge for cause from a position for which the employee is qualified does not extinguish that right. There is no suggestion that a different result would obtain if the non-equivalent position "had a bearing on his suitability to perform his pre-strike or a substantially equivalent position." The decision below is a broad and unqualified holding that unless an employee is reinstated to his former or a substantially equivalent position, a discharge for cause is not a legitimate and substantial business justification for extinguishing a striker's rights under *Fleetwood*. (Pet. App. 16a-17a).

Moreover, in view of the requirement that an employer must reinstate strikers to the first available position for which they are qualified, even if it is a "lesser position," the legal standard

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Notably, the Board now abandons the cases cited by the Court of Appeals in support of its statement that "[t]he NLRB has consistently taken the position that employers must reinstate striking employees to their former or substantially equivalent positions before an employer's *Laidlaw* obligations are satisfied." (Pet. App. 9a). Those cases are discussed in Webb's Petition. (Pet. 12-13 n.4).

suggested by the Board would be meaningless even if it had been adopted by the Seventh Circuit. In virtually every case where an employer hires permanent replacements during a strike, as was the case here, the only positions initially available to returning strikers will be non-equivalent ones. These positions will seldom, if ever, bear any relationship to the reinstated striker's "suitability" to perform his pre-strike position. Thus, an employer almost never would be justified in terminating a reinstated striker for poor performance. And, of course, comparing objective position requirements will never measure reinstated strikers' *willingness* to put forth the requisite effort to meet an employer's legitimate, non-discriminatory business expectations.[3]

The impact of the Court of Appeals' decision is devastating. Employers are required to offer strikers reinstatement to positions for which they are qualified. If the striker accepts and thereafter fails to perform, an employer cannot sever the employment relationship. Rather, the employee must be returned to the recall list and, presumably, be reinstated to the next position for which he is qualified. If his performance is again deficient, this procedure is repeated, *ad infinitum*, until he obtains substantially equivalent employment. This holding is now the law in the Seventh Circuit. This is the holding for

[3]Significantly, neither the ALJ nor Board made any finding that the three reinstated employees were willing to put forth the necessary effort. Indeed, there was testimony at the hearing that the reinstated employees *could* perform the work, but simply "would not". (Pet. App. 31A). Moreover, the evidence Webb introduced at trial showed that other reinstated strikers easily performed this entry-level work, as did new hires, thus demonstrating it was the employees' *effort* which was lacking, not ability. (Pet. App. 32a-33a).

which Webb seeks review, not the Board's incorrect characterization.[4]

2. The Board argues that there is no conflict between the decision below and the Sixth Circuit's decision in *NLRB v. American Olean Tile Co.*, 826 F.2d 1496 (1987). (Br. Opp. 13-14). But the conflict was recognized even in the opinion below (Pet. App. 15a n.9), and is elsewhere acknowledged by the Board's statement that *American Olean* conflicts "with a long line of Board authority and decisions by other courts of appeals." (Br. Opp. 14-15 n.6)

Moreover, the dispute in *American Olean* stemmed from the fact that twelve reinstated employees were transferred to another plant -- where they had worked prior to the strike -- when openings occurred, even though there were "more senior [unreinstated] employees whose names had not been reached on the chronological [list]" who also were seeking reinstatement at the other plant. 826 F.2d at 1498. The ALJ found that this transfer constituted a violation of the Act *because* "the [transferred] employees were not fully reinstated when they were [initially reinstated], but only when

[4]The Board states that the ALJ found "in the alternative" that Webb "had discriminated against the three employees at issue by failing to follow its past practice of transferring individuals who could not perform a given job to another position that they could perform." (Br. Opp. 4). This was not even a "holding," let alone an "alternative" holding, and neither the Board nor Court of Appeals refer to this finding in their decisions. The Board's finding that Webb was privileged to terminate them for "poor performance" -- without any reference to Webb's obligation to transfer them to other positions -- confirms that the *only* employment decision at issue was Webb's failure to reinstate the employees to their pre-strike or substantially equivalent positions, not its decision to discharge them or its alleged failure to transfer them.

they were transferred to [to their former plant]." 826 F.2d at 1498-1499. The Sixth Circuit, by contrast, held that:

> [T]he reinstatement of the twelve (12) employees occurred when they [initially] were recalled to work . . . The ALJ's [erroneous] construction [of *Fleetwood*] would permit an employee to decline an offer of reinstatement to a position for which he was merely qualified and later demand reinstatement to his former position or to a substantially equivalent one when it became vacant.

826 F.2d at 1501.

The court therefore refused to enforce the Board's order because it concluded *Fleetwood* is satisfied when a striker is offered reinstatement to *any* position for which he is qualified. Thus, the Sixth Circuit's view of the extent of the *Fleetwood* reinstatement obligation: (1) was essential to its holding; and (2) is in direct conflict with the Seventh Circuit's holding below.

3. The Board fails to identify any statutory language or legislative history which supports the Court of Appeals' direct contravention of Section 10(c). (Br. Opp. 15-16). The Board argues only that since "the discharge for cause bore no relation to the employees' ability to perform their pre-strike jobs" Section 10(c) is inapplicable. (Br. Opp. 15).

This argument, like the decision below, cannot be reconciled with the language of the statute, which unambiguously provides:

> No order of the Board shall require the reinstatement of *any* individual *as an employee* who has been suspended or discharged or the payment to him of any backpay if

such individual was suspended or discharged *for cause*. (Emphasis supplied).

It is undisputed that the employees here were terminated "for cause." Under this plain statutory language, the Board is prohibited from reinstating them *as employees* -- regardless of the *position* to which they are reinstated

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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